Supreme Court, U.S.
FILED
SEP 4 1991
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(3)

No. 90-1828

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SAMMY G. DAILY AND FREDERIK A. FIGGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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As we explained in the petition, this case offers the Court the opportunity to resolve a long-standing disagreement among the circuits concerning the need for a special jury instruction on character evidence and whether the omission of such an instruction is plain error.

1. With respect to the plain error issue, respondents contend that plain error findings are "highly factual determinations" (Br. in Opp. 16) and that the cases that we cited in the petition (Pet. 11-13) can be distinguished on their facts because of the "almost total lack of character evidence presented by each of the defendants" and because of the strength of the

evidence in each case.[1] Br. in Opp. 16. Yet the circuits holding that the omission of a character evidence instruction is not plain error have not limited their analysis in that way. Those courts have indicated that they would not be prepared to find plain error in the omission of a character evidence instruction except, perhaps, in the highly unusual situation in which the omission of the instruction "probably changed the outcome of the trial." *United States* v. *Watson*, 894 F.2d 1345, 1350 (D.C. Cir. 1990); see *United States* v. *Marquardt*, 786 F.2d 771, 784 (7th Cir. 1986). The court of appeals in this case found plain error even though it did not find that the omission of the character evidence instruction probably changed the outcome of the trial. Indeed, it could not plausibly have made such a finding in light of the very limited role played by respondents' character evidence in the lengthy trial below. See Pet. 4-5, 9.

As we noted in the petition, the court of appeals purported to base its plain error ruling on the facts of this case. The facts on which it based its findings, however, fall into two categories: those that cannot be known by the district court at the time the court instructs the jury, such as whether the verdict will be divided and whether the jury deliberations will be lengthy; and those that are common to many trials in which character evidence is offered, such as

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[1] Respondents "do not challenge" (Br. in Opp. 14) the conclusion that they failed to preserve their objection to the district court's refusal to give their requested instruction. Accordingly, they recognize the applicability of the "plain error" standard of review. See *United States* v. *Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991) ("requested instructions do not substitute for specific objections to the court's instructions," citing cases).

whether the character evidence is substantial and relevant to a material issue at trial.[2] If the omission of a character evidence instruction in this case was plain error, the omission of such an instruction will be plain error in a very large number of cases in which such evidence is introduced.

2. With respect to the subsidiary question of whether a character evidence instruction is required at all, respondents do not argue that the courts of appeals are in accord on that issue. Instead, they contend only that "the clear weight of legal authority" requires such an instruction (Br. in Opp. 7, 10). In any event, although several courts require (incorrectly, we submit—see Pet. 15-16) a special instruction on character evidence,[3] respondents overstate the weight of authority for that position.

For example, in *United States* v. *Hewitt*, 634 F.2d 277 (5th Cir. 1981), and *Darland* v. *United States*, 626 F.2d 1235 (5th Cir. 1980), the issue was

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[2] It is not at all clear why the court should be more willing to find plain error in a case in which the character evidence is strong. In that kind of case, the jury is most likely to be moved by the character evidence and counsel's argument from it, and therefore not to need an instruction from the court on the subject.

[3] For example, respondents cite *United States* v. *Cramer*, 447 F.2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972) (district court's failure to give special "standing alone" instruction required by Circuit held to be harmless error), and *United States* v. *Quick*, 128 F.2d 832 (3d Cir. 1942). Although *Quick* found that a properly preserved objection to a trial court's refusal to give a special character instruction required reversal, it also explained (128 F.2d at 835) that the instruction given ("you may consider the character witnesses") was inadequate because—like the instruction this Court found improper in *Edgington* v. *United States*, 164 U.S. 361 (1896)—it "tended to discount the status of the character evidence."

whether the trial court committed error by failing to admit evidence of good character when the defendant did not testify in his own behalf. In both cases, the appellate court held that a defendant may offer evidence of good character without testifying. *Hewitt*, 634 F.2d at 279; *Darland*, 626 F.2d at 1237-1238. Although the court in both cases indicated in dicta that evidence of good character may entitle a defendant to an appropriate jury instruction (*Hewitt*, 634 F.2d at 278; *Darland*, 626 F.2d at 1238), the question of the necessity of such an instruction was not before the court in either case. When the Fifth Circuit was subsequently squarely presented with that question in *United States* v. *Hunt*, 794 F.2d 1095 (1986), it concluded that such an instruction was not legally required even when properly preserved for appellate review. *Id.* at 1098-1099. Accord *United States* v. *Baytank (Houston), Inc.*, 934 F.2d 599, 614 (5th Cir. 1991) ("This Court's dictum in *Hewitt* notwithstanding, [defendant] has not cited a single case (and we know of none) where this Court or the Supreme Court has found reversible error in the refusal to *give* a character instruction, as opposed to the refusal to admit character evidence or the giving of an erroneous character instruction.").[4]

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[4] Respondents also rely on dicta in cases affirming convictions because no special character instruction was appropriate (*United States* v. *Franchi-Forlando*, 838 F.2d 585 (1st Cir. 1988); *United States* v. *Thomas*, 676 F.2d 531 (11th Cir. 1982)), in cases in which a character instruction was in fact given (*United States* v. *Huddleston*, 811 F.2d 974 (6th Cir. 1987), aff'd on other grounds, 485 U.S. 681 (1988); *Hawley* v. *United States*, 133 F.2d 966, 972 (10th Cir. 1943)), and in a case reversing a conviction on other grounds (*United States* v. *Fox*, 473 F.2d 131 (D.C. Cir. 1972)). In addition, respondents cite several state court decisions, none of which suggests that the failure to give their suggested character instruction was plain error. *Curry* v. *United States*, 498 A.2d 534, 544

Respondents incorrectly assert (Br. in Opp. 13) that the decisions in *Hunt* and in *United States* v. *Krapp*, 815 F.2d 1183 (8th Cir.), cert. denied, 484 U.S. 860 (1987), "rest on findings that the district courts' failure to give specific character evidence instructions created no prejudice to the defendants and not on legal rulings that such failure does not constitute trial error." But the court in *Krapp* specifically "f[ou]nd no error in the trial court's failure to give a specific character instruction" (815 F.2d at 1187). Similarly, *Hunt* did not rest on harmless error grounds; the court instead quite explicitly held that there was no error. 794 F.2d at 1099. See *United States* v. *Baytank (Houston), Inc.*, 934 F.2d at 614 ("[T]his Court [in *Hunt*] has found a district court's refusal to give a character instruction, although legally correct and not otherwise substantially covered in the jury charge, not to have been an abuse of discretion.").

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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(D.C. App. 1985) (ineffective assistance of counsel claim; failure to call character witnesses was harmless error); *Duvall* v. *State*, 259 Ga. 801, 802-803, 387 S.E.2d 880, 882 (1990) (failure to give instruction on character evidence was harmless error); *State* v. *Ramos*, 121 N.H. 863, 868-869, 435 A.2d 1122, 1125 (1981) (noting that federal courts of appeals are divided on the character instruction issue; convictions reversed on other grounds); *State* v. *Moreno*, 98 N.C. App. 642, 646-647, 391 S.E.2d 860, 863 (1990) (failure to give special character instruction was harmless error); *State* v. *Green*, 278 S.C. 239, 294 S.E.2d 335 (1982) (same).

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